

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MISSOURI  
WESTERN DIVISION

WEST BEND MUTUAL INSURANCE	)	
COMPANY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No.:
	)	
ZAKARIYA AL-SHAWISH, ASHLEY	)	
AL-SHAWISH, ARIA AL-SHAWISH,	)	
EMILY HAMMERLY, JOSEPH HAMMERLY,	)	
And LITTLE LEARNER II, LLC,	)	
	)	
Defendants.	)	

**COMPLAINT FOR DECLARATORY JUDGMENT**

Plaintiff West Bend Mutual Insurance Company, for its Complaint for Declaratory Judgment under 28 U.S.C. §§ 2200 and 2210 and Rule 57 of the Federal Rules of Civil Procedure, states:

**PARTIES, JURISDICTION, AND VENUE**

1. Plaintiff West Bend Mutual Insurance Company (“WBMI”) is a foreign insurance corporation organized and existing under the laws of the State of Wisconsin and authorized through the Missouri Department of Insurance to conduct insurance business in the State of Missouri, with its principal place of business in West Bend, Wisconsin.

2. Upon information and belief, Defendants Al-Shawish are all citizens and residents of the State of Missouri, residing together at 409 Northeast Crescent Street, Lee's Summit, Missouri 64086.

3. According to Fed. R. Civ. P. Rule 17(c)(1), Aria Al-Shawish is a minor child, properly represented in this suit by her parents, Zakariya Al-Shawish and Ashley Al-Shawish, in their capacity as general guardians.

4. Upon information and belief, Defendant Emily Hammerly is a citizen and resident of the State of Missouri, residing at 2505 NE Indian Pointe, Lee's Summit, Missouri 64086.

5. Upon information and belief, Defendant Joseph Hammerly is a citizen and resident of the State of Missouri, residing at 2505 NE Indian Pointe, Lee's Summit, Missouri 64086.

6. Upon information and belief, Defendant Little Learner II, LLC is a Missouri limited liability corporation

7. Little Learner II, LLC is no longer in operation, but during its operation it was located at 3801 NE Independence, Lee's Summit, Missouri 64064 and its headquarters were in Jackson County, Missouri.

8. Emily Hammerly is the sole member of Little Learner II, LLC.

9. This case and controversy involves citizens of different states.

10. The amount in controversy exceeds the sum or value of \$75,000, exclusive of interests and costs.

11. This Court has jurisdiction under 28 U.S.C. §1332(a)(1).

12. Venue is proper in the United States District Court for the Western District of Missouri under 28 U.S.C. § 1391(a) because all Defendants are citizens of Missouri and residents of the District, and all of the events and occurrences giving rise to this action occurred in this District.

13. This Court “may declare the rights and other legal relations of any interested parties seeking such declaration” pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201(a) with respect to the policy of insurance issued by West Bend to Vanguard Security Services and all above referenced parties are interested parties with respect to the termination of rights pursuant to the insurance policy issued by West Bend to Vanguard Security Services.

14. Therefore, both jurisdiction and venue are proper with this Court.

#### **FACTUAL ALLEGATIONS**

15. Emily Hammerly owned and operated a day care known as Little Learner, Inc. beginning in 2004. That day care center was located at 800 SE Church Road, Lee’s Summit, Missouri.

16. Little Learner, Inc. is insured under West Bend Mutual Insurance Company Policy No. 0110328331 for the policy period of December 1, 2018-December 1, 2019 (cancelled by insured on August 2, 2019).

17. Defendant Aria Al-Shawish attended the Little Learner, Inc., day care center at all relevant periods of time.

18. Joseph Hammerly was an employee of Little Learner, Inc. at all relevant periods of time.

19. The alleged sexual abuse of Aria Al-Shawish occurred at the Little Learner, Inc. facility.

20. Emily Hammerly owned and operated a second day care center, Little

21. Upon information and belief, Little Learner, Inc. and Little Learner II, LLC shared common ownership, but the two day care centers are separate legal entities and separate operations:

- a. Each business is a separate legal entity;
- b. Each day care serviced a unique age of children;
- c. Each day care center had its own employees;
- d. Each day care center kept its own books;
- e. Children were enrolled in only one of the day care centers at any given time;

22. Zakariya Al-Shawish and Ashley Al-Shawish have made a claim that their daughter, Aria Al-Shawish, was sexually molested at the Little Learner, Inc. day care center located at 800 SE Church Road, Lee's Summit, Missouri 64063.

23. Upon information and belief, Plaintiff Aria Al-Shawish has never attended Little Learner II, LLC and her alleged injuries did not arise at Little Learner II, LLC's location, or through its operations.

24. Upon information and belief, Defendant Joseph Hammerly was an employee of Little Learner, Inc. at the time he allegedly sexually abused five-year-old Aria Al-Shawish.

25. The alleged injury to Aria Al-Shawish did not occur as part of the operation of Little Learner II, LLC's operations.

26. Emily Hammerly was not working in the business of Little Learner II, LLC, at the time of this alleged incident.

27. A member of the staff of Little Learner, Inc. reported that alleged abuse to Emily Hammerly at her home in Lee's Summit.

28. No staff of Little Learner II, LLC was involved in the response to or investigation of the allegations of sexual abuse of Aria Al-Shawish by Joseph Hammerly.

#### **THE INSURANCE POLICIES**

29. WBMI issued a commercial general liability policy to Little Learner II, LLC bearing policy number A17095104 for the policy period of July 5, 2019 to July 5, 2020

(cancelled by insured on August 1, 2019). A true and correct copy of that policy is attached as Exhibit 1 and incorporated by reference.

30. That policy also included Commercial Liability Umbrella Coverage for Little Learner II, LLC bearing policy number A17095104 for the policy period of July 5, 2019 to July 5, 2020 (cancelled by insured on August 1, 2019). (Ex. 1)

31. The WBMI Businessowners Liability policy provides coverage for the operation of Little Learner II, LLC, as follows:

#### **BUSINESSOWNERS LIABILITY COVERAGE FORM**

##### **A. COVERAGES**

###### **1. Business Liability**

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury", "property damage", "personal injury" or "advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury", "property damage", "personal injury", or "advertising injury" to which this insurance does not apply. We may at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

(1) The amount we will pay for damages is limited as described in Section **D** – Liability And Medical Expenses Limits of Insurance; and

(2) Our right and duty to defend end when we have used up the applicable limit of insurance in the

payment of judgments or settlements or medical expenses.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Coverage Extension – Supplementary Payments.

32. The policy defines “occurrence” as:

“Occurrence” means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

33. The policy provides: Throughout the policy the words “you” and “your” refer to the Named Insured shown in the Declarations. The words “we”, “us” and “our” refer to the Company providing this insurance.

34. The policy states “insured” means any person or organization qualifying as such under Section C – Who Is An Insured.

#### **C. Who Is An Insured**

1. If you are designated in the Declarations as:

c. A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.

2. Each of the following is also an insured:

a. Your “employees”, other than either your “executive officers” (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability

company), but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business.

35. Emily Hammerly was an executive officer of Little Learner II, LLC, but was not acting within the scope of her employment with or conducting business on behalf of Little Learner II, LLC, at the time of the alleged injuries.

36. The Little Learner II, LLC Businessowners Liability the following:

**LIMITATION OF COVERAGE TO DESIGNATED PREMISES OR PROJECT**

This endorsement modifies insurance provided under the following:

**BUSINESSOWNERS POLICY**

**Premises:**

**Project:** Childcare Activities and Operations Only

The following is added to the Businessowners Liability Coverage Form:

This insurance applies only to "bodily injury," "property damage," "personal injury," "advertising injury" and medical expenses arising out of:

1. The ownership, maintenance or use of the premises shown in the Schedule and operations necessary or incidental to those premises; or
2. The project shown in the Schedule.

37. The policy affords coverage only for the operation of Little Learner II, LLC, and to Emily Hammerly for the conduct of the business of Little Learner II, LLC as a child care provider:



**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

**CHILD CARE PROFESSIONAL LIABILITY**

This endorsement modifies insurance provided under the following:

**BUSINESSOWNERS POLICY**

The Businessowners Liability Coverage Form is amended as follows:

- A. Paragraph A. Coverages also applies to “bodily injury”, “property damage”, “personal injury”, “advertising injury” or other injury arising out of the rendering of or failure to render professional services in connection with the operation of the insured’s business as a child care provider.

The endorsement limits coverage as follows:

However, this coverage will not apply to any criminal actions by you:

- D. The following is added to Exclusions:

This insurance does not apply to “bodily injury”, “property damage”, “personal injury”, “advertising injury” or other injury arising out of:

1. The violation of any statute, or governmental rule or regulation.
2. A criminal act including but not limited to fraud committed by the insured or any person for whom the insured is legally responsible.

38. The Little Learner II, LLC policy provides coverage for abuse and sexual molestation for “the insured” on the following terms:

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

## **PHYSICAL ABUSE AND SEXUAL MOLESTATION LIABILITY ENDORSEMENT**

This endorsement modifies insurance provided under the following:

### **BUSINESSOWNERS POLICY**

#### **A. Coverage**

##### **1. Insuring Agreement**

We will pay those sums the insured becomes legally obligated to pay as damages because of "physical abuse", "mental injury" or "sexual molestation" arising out of the negligent:

- (a) employment;
- (b) investigation;
- (c) supervision;
- (d) reporting to the proper authorities, or failure to so report; or
- (e) retention of any person for whom the insured is legally responsible;

39. No insured is covered under the following circumstances:

##### **2. Exclusions**

This insurance does not apply to any person who:

- (a) committed or attempted to commit;
- (b) participated in;
- (c) directed;
- (d) knowingly allowed;

- (e) failed to take action to prevent recurrence after having knowledge of;

any act of “physical abuse”, “mental injury” or “sexual molestation”. We will defend any insured accused of such conduct until our investigation determines that the accusation is correct.

40. The Commercial Liability Umbrella policy includes the following Insuring Agreement:

### **COMMERCIAL LIABILITY UMBRELLA COVERAGE FORM**

Throughout this policy the words “you” and “your” refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words “we”, “us” and “our” refer to the company providing this insurance.

The word “insured” means any person or organization qualifying as such under Section II – Who Is An Insured.

### **SECTION I – COVERAGES**

#### **COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY**

##### **1. Insuring Agreement**

- a. We will pay on behalf of the insured the “ultimate net loss” in excess of the “retained limit” because of “bodily injury” or “property damage” to which this insurance applies. We will have the right and duty to defend the insured against any “suit” seeking damages for such “bodily injury” or “property damage” when the “underlying insurance” does not provide coverage or the limits of “underlying insurance” have been exhausted. When we have no duty to defend, we will have the right to defend, or to participate in the defense of, the insured against any other “suit” seeking damages to which this insurance may apply. However, we will have no duty to defend the insured against any “suit” seeking damages for “bodily injury” or

“property damage” to which this insurance does not apply. At our discretion, we may investigate any “occurrence” that may involve this insurance and settle any resultant claim or “suit” for which we have the duty to defend. But:

- (1) The amount we will pay for the “ultimate net loss” is limited as described in Section III – Limits Of Insurance; and
- (2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgements or settlements under Coverages **A** or **B**.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages **A** and **B**.

42. The word “insured” as used in the Umbrella Liability coverage form “means any person or organization qualifying as such under Section II – Who Is An Insured,” which provides:

## **SECTION II – WHO IS AN INSURED**

1. Except for liability arising out of the ownership, maintenance or use of “covered autos”:
  - a. If you are designated in the Declarations as:
    - (3) A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.
3. Any additional insured under any policy of “underlying insurance” will automatically be an insured under this insurance.

No person or organization is an insured with respect to the conduct of any current or past partnership, joint venture or limited liability company that is not shown as a Named Insured in the Declarations.

43. The Umbrella Liability form states: Throughout this policy the words “you” and “your” refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words “we”, “us” and “our” refer to the company providing this insurance.

44. The Al-Shawish defendants have claimed that Joseph Hammerly molested Aria Al-Shawish on more than one occasion at Little Learner, Inc.

45. The Al-Shawish defendants have made no claims that Aria Al-Shawish ever attended Little Learner II, LLC’s facility.

46. To the extent Defendants assert this policy should provide coverage in addition to any coverage provided under the Little Learner, Inc. policy, the following endorsement limits coverage to a single policy limit:

**TWO OR MORE COVERAGE FORMS OR POLICIES ISSUED BY US**

This endorsement modifies insurance provided under the following:

**BUSINESSOWNERS COVERAGE FORM  
COMMERCIAL GENERAL LIABILITY COVERAGE PART**

If this Coverage Form and any other Coverage Form or policy issued to you by us or any company affiliated with us apply to the same “accident”, the aggregate maximum Limit of Insurance under all the Coverage Forms or policies shall not exceed the highest applicable Limit of Insurance under any one Coverage Form or policy. This condition does not apply to any Coverage Form or policy issued by us or an affiliated company specifically to apply as excess insurance over this Coverage Form.

## GROUNDS FOR DECLARATORY JUDGMENT

47. WBMI insured Little Learner II, LLC for its operation, but that operation has no relation to the injury being claimed by the Al-Shawish Defendants.

48. Emily Hammerly is an insured under the Little Learner II, LLC policies only “with respect to the conduct of Little Learner II, LLC’s business.”

49. Emily Hammerly is not an insured under the Little Learner II, LLC policies for any work she performed for Little Learner, Inc., or any other entity.

50. The Al-Shawish claim does not arise out of the conduct of Little Learner II, LLC’s business, as the alleged injury occurred at a separate day care center.

51. WBMI has no obligation to defend or indemnify Emily Hammerly, Joseph Hammerly, or Little Learner, Inc. against any claims made by the Al-Shawish Defendants under the policies of insurance issued to Little Learner II, LLC.

52. All necessary and proper parties are before the Court for the matter in controversy.

53. WBMI has no other adequate remedy at law.

WHEREFORE, Plaintiff West Bend Mutual Insurance Company requests this Court to enter judgment in its favor and against the Defendants, and declare as follows:

- a. That the Businessowners’ Liability insurance policy issued to Little Learner II, LLC does not provide coverage for any activities at Little Learner, Inc., or any injury that resulted therefrom;

- b. That the Commercial Liability insurance policy issued to Little Learner II, LLC does not provide coverage for any activities at Little Learner, Inc., or any injury that resulted therefrom;
- c. That Emily Hammerly is insured under the Little Learner II, LLC policy only for her acts as a member of that limited liability corporation for the conduct of the business of Little Learner II, LLC.
- d. That Emily Hammerly is not an insured under the Little Learner II, LLC, policy for any claim arising out of the operations of Little Learner, Inc., but does not provide coverage does any activities or liabilities at, or involving, Little Learner, Inc.
- e. That WBMI has no duty to defend or indemnify Emily Hammerly, Joseph Hammerly or Little Learner II, LLC against any claims brought by the Al-Shawish Defendants against Little Learner II, LLC, or any of its employees, officers or directors.
- f. That WBMI is entitled to its costs, including attorney's fees; and
- g. That WBMI is entitled to any further relief this Court deems just and proper.

**DEMAND FOR TRIAL BY JURY**

Respectfully submitted,

/s/ Elaine M. Moss

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